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No. 79-1865

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

BERNARD OSTRAGER,
Appellant,
VS.
STATE BOARD OF CONTROL, et al.,
Appellees.

On Appeal from the Court of Appeal of the State of California, First Appellate District Division Four

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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MOTION OF APPELLEES TO DISMISS OR AFFIRM

Appellees State Board of Control of the State of California and the individual members thereof, Kenneth Cory, Ruth Church Gupta and David Janssen, in their official capacities, pursuant to Rule 16.1 subsections (b) and (d) of the Rules of the Supreme Court respectfully move to dismiss this appeal or affirm the decision of the Court of Appeal of the State of California (First Appellate District, Division Four) which affirmed a trial court judgment in favor of appellees. Appellees submit that this appeal presents no substantial federal question as warrants further argument or consideration.

Opinion Below, Jurisdiction and Statute Involved

Appellant's Jurisdictional Statement of May 21, 1980 accurately identifies the action of the California courts from which this appeal is taken, the jurisdiction of this Court, and the California Statute in issue, California Government Code section 13961(a).[1]

Questions Presented

1. Under the Privileges and Immunities Clause of Article IV of the Constitution of the United States, may California limit the benefits conferred by its victims of crimes act to persons who were or are at the time of their injury "residents of California"?

2. Is California's limitation of benefits under its victims of crime act to those who are or were ". . . residents of California at the time the crime was committed . . ." repugnant to the Equal Protection or Privileges or Immunities clauses of the Fourteenth Amendment to the Constitution of the United States or to the Commerce Clause thereof?

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[1]California Government Code section 13961(a) provides:

"(a) A victim of a crime of violence may file an application for assistance with the board provided that the victim was a resident of California at the time the crime was committed and either:

(1) The crime was committed in California; or

(2) The person whose injury or death gave rise to the application was a resident of California who was injured or killed while temporarily outside the state."

STATEMENT OF THE CASE

A. Nature of the Action

The California Victims of Crime Act, Government Code sections 13959 through 13969.1, provides limited benefits to a limited category of victims of violent crimes. The victim of violent crimes program is administered by appellee State Board of Control. Pursuant to the act, the Board will not accept applications from victims who were not residents of California at the time they were injured. The Board of Control and its members are the appellees in this action in which appellant challenges the constitutionality of the non-durational residency limitation and the action of the Board of Control based thereon.

B. Summary of Facts

Appellant, a citizen and resident of the State of New York, was shot in the leg while vacationing in California. He was hospitalized for medical treatment in San Francisco and then returned home to New York. He filed an application for benefits under California's Victims of Crime statute. Appellee Board of Control refused to accept the application because appellant was not, and did not claim to have been, a resident of California at the time the crime was committed.

C. Summary of Proceedings In The Trial Court and Relief Sought

Following appellee Board's refusal to accept appellant's application, appellant filed a petition for writ of mandate and for declaratory and other relief in the Superior Court for the City and County of San Francisco. He sought a

declaration that the non-durational residency limitation in the Victims of Crime Act is unconstitutional and an order directing appellee Board of Control to entertain his application in spite of the fact that he was not and did not claim to have been a resident of California at the time the crime was committed. An alternative writ issued. Appellees demurred generally to the Petition. The trial court heard the case on stipulated facts, briefs and oral argument. The trial court sustained appellees' demurrer without leave to amend, discharged the alternative writ, denied a peremptory writ and dismissed appellant's complaint for declaratory relief, for relief under the Federal Civil Rights Act of 1871, and for declaratory relief. Judgment was entered for appellees and appellant appealed.

D. Summary of Proceedings In And Decision of Court of Appeal

By decision filed November 29, 1979, (Appendix A to Appellant's Jurisdictional Statement herein), the Court of Appeal affirmed the trial court's judgment. The trial court action affirmed was predicated upon the fact that at the time petitioner became a victim of violent crime, he was a citizen of the United States and a citizen and resident of New York but not a resident of California and so not entitled to relief under the California Victims of Crime statute which constitutionally limited relief thereunder to California residents.

The decision of the Court of Appeal accurately describes the proceeding brought by appellant and the trial court's action (Decision, Pp. 1-2). The Court of Appeal reviewed the Victims of Crime statute, considered appellant's con-

tentions of constitutional invalidity that the statute denied to appellant privileges and immunities and equal protection, violated the commerce clause, and that the statute is unconstitutional under the California Constitution. Finding no constitutional invalidity, the Court of Appeal affirmed the trial court's judgment.

Appellant's petition for hearing by the Supreme Court of California was thereafter denied February 12, 1980 as indicated by Appendix B to appellant's Jurisdictional Statement.

E. The California Victims of Crime Act

The California Victims of Crime Act is found in California Government Code sections 13959-13969.1. The act created and provides for a program of limited and restricted benefits and relief only. One of the limitations placed by the Legislature on the scope of the program is that to apply for benefits, the victim must have been "a resident of California at the time the crime was committed." (Government Code § 13961(a)); the residency limitation imposed includes no duration or minimum time of residency requirement.[2]

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[2]Other limitations on the scope of the program are created by restricting benefits to "innocent" (Section 139.46(a) & (b)) "victims", who are defined in narrow terms (Section 13960(a)), of crimes of violence only (Section 13960(b)) who suffer pecuniary loss, meaning medical expense, loss of income or support, which is not indemnified from other sources, equals more than $100 or 20% of the victim's net monthly income (Section 13960(d)) and is not recoupable by the victim without suffering serious financial hardship (Section 13959). The statute specifically limits amounts payable to not to exceed $10,000 in medical expense, $10,000 in loss of wages or support, and $3,000 in job retraining or rehabilitation expenses (Section 13965).

California's Victims of Crime Act is and was, for the United States, a statute of first impression, passed initially in 1965; England and New Zealand had previously passed victims of crimes compensation statutes. (Aid to Victims of Violent Crimes In California, Shank, Willard (1970) 43 So. Cal. L.R. 85). The enactment by California was an experiment for, and by it, California attempted to meet, in part, a previously felt need or obligation to provide needed compensatory relief to victims of violent crimes. Consistent with well established precèdent, California did not attempt to resolve or cure the entire problem; to the contrary, it sought simply to ameliorate the loss suffered by victims of crime. Partial alleviation or amelioration, as distinguished from total solution, is an appropriate legislative objective, as repeatedly indicated by pronouncements of this Court. In *Katzenbach v. Morgan*, 384 U.S. 641 (1965), the Court stated at page 657:

> " . . . in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' . . . that a legislature need not 'strike at all evils at the same time,' . . ., and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' " (Citations omitted).

In 1976 as to a limitation of those who might operate push-carts in the French Quarter of New Orleans to those who had done so of long standing, the Court stated in *New Orleans v. Dukes*, 427 U.S. 297 (1976) at pages 303-304:

> "Legislatures may implement their program step by step . . . In short, the judiciary may not sit as a super-

> legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . ., in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment . . ."

Respondents submit such is equally applicable here and that the California Victims of Crime Act is not to be held invalid because it sought to protect the public fisc by limiting the breadth and scope of the program, by among other restrictions, limiting those eligible for receipt of benefits to persons who were residents of California at the time they were criminally victimized.

The Questions Posed Present No Substantial Federal Question

1. There is precedent for this Court's dismissal and affirmance of appeals contesting the validity of statutes which discriminate on the basis of residency for want of a substantial federal question

This Court has regularly dismissed or affirmed appeals from decisions sustaining the validity of statutes which denied State benefits on grounds of lack of required residency. In *Kirk v. Board of Regents* (1969) 273 Cal.App.2d 430, petition for hearing by California Supreme Court denied August 13, 1969, this Court granted a motion to dismiss for want of a substantial federal question (*Kirk v. Board of Regents* (1970) 396 U.S. 554). The California Court of Appeals decision in *Kirk* held that a nonresident's fundamental right to travel was not infringed

by not merely a residency requirement but a durational residency requirement of one year as a condition to no or substantially reduced tuition or fees to attend the State University. In a similar tuition case originating in Minnesota, this Court affirmed a similar residency requirement (*Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn. 1970), aff'd mem. 401 U.S. 985 (1971)). As to a non-durational residency requirement, this Court dismissed for want of a substantial federal question an appeal from a decision upholding the total exclusion from a state of non-resident hunters of migratory waterfront (*State v. Kemp* (1950) 73 S.D. 458, 44 NW 2d 214, appeal dismissed (1951) 340 U.S. 923).

For the reasons set forth below, appellees submit the instant appeal is wanting as to any substantial federal question and that thus this appeal should be summarily dismissed or the decision appealed from affirmed.

2. The non-durational residency requirement included in California's victims of crime statute does not violate the Privileges and Immunities Clause of Article IV Section 2(1)

The privileges and immunities clause of Article IV Section 2(1) is not a provision the scope and meaning of which has been thoroughly defined by multiple litigation and judicial interpretation over its two hundred year life span (*Baldwin v. Montana Fish & Game Comsn.*, 436 U.S. 371, 379-380 (1978) hereafter sometimes referred to as *"Baldwin"*). The clause was designed to afford the citizens of one state who visited another the basic rights of citizens of the visited state (*Paul v. Virginia*, 8 Wall 168, 180

(1869); *Baldwin, supra,* 382) to the end that there might be formed and maintained a single nation (*Austin v. New Hampshire,* 420 U.S. 656, 660-661 (1975); *Baldwin, supra,* 382-383). To such end, Article IV Section 2(1) has been applied to invalidate unreasonable burdens imposed on citizens of other states in pursuing common callings within a visited state (*Ward v. Maryland,* 12 Wall 418 (1871); *Hicklin v. Orbeck,* 437 U.S. 518 (1978); *Mullaney v. Anderson,* 342 U.S. 415 (1952)), on ownership and disposition of property privately held within a State (*Blake v. McClung,* 172 U.S. 239 (1898), and in seeking access to the courts of a visited State (*Canadian Northern R Co. v. Eggen,* 252 U.S. 553 (1920)). Conversely, as noted in *Baldwin* at pages 383-384:

> "It has not been suggested, however, that state citizenship or residency may never be used by a State to distinguish among persons. Suffrage, for example, always has been understood to be tied to an individual's identification with a particular State. See, e.g., *Dunn v. Blumstein,* 405 U.S. 330 (1972). No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective office of the State. *Kanapaux v. Ellisor,* 419 U.S. 891 (1974); *Chimento v. Stark,* 353 F.Supp. 1211 (NH), summarily aff'd, 414 U.S. 802 (1973). Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do. *Canadian Northern R. Co. v. Eggen, supra;* cf. *Sosna v. Iowa,* 419 U.S. 393 (1975); *Shapiro v. Thompson,* 394 U.S. 618 (1969). Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States,

> and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and non-resident, equally. Here we must decide into which category falls a distinction with respect to access to recreational big-game hunting."

While a State is not precluded by the Privileges and Immunities Clause from discriminating on the basis of residency alone, its power so to do is limited when such exercise significantly affects exercise of basic constitutional rights as for example the right to engage in interstate commerce, the right to pursue a livelihood, or the implementation of federal powers (*Baldwin, supra,* pages 385-386; *Hicklin, supra; Toomer v. Witsell,* 334 U.S. 385 (1948). In *Baldwin* at page 387 the Court summarized the force of the clause:

> "With respect to such basic and essential activities (pursuit of common callings, ability to transfer property, access to the courts), interference with which would frustrate the purposes of the formation of the Union, the States must treat residents and non-residents without unnecessary distinotions." (material in parenthesis added.)

The two basic standards for testing the validity under Article IV Section 2(1) of state classifications which discriminate against non-residents have been (1) whether there was a substantial reason for the discrimination beyond the mere fact of residency in another State and (2) as to licensing and regulatory measures, whether there

is something whereby non-residents constitute a peculiar source of evil or problem at which the discriminatory statute is aimed (*Toomer v. Witsell,* 334 U.S. 385, 398 (1948). The latter standard, a peculiar evil associated with non-residents, is not apposite to the instant appeal for California's victims of crimes act is not a licensing or regulatory statute and is not designed to deal with an evil created by non-resident visitors. Thus the standard applicable is simply that California must have had a substantial reason to distinguish between residents and non-residents. As in this Court's recent Baldwin decision, California has such a substantial reason.

California's victims of violent crime statute is a statute of first impression. It created a program of first impression, the fiscal effects of which are yet being ascertained. The program is financed entirely with State funds. The California Legislature in providing for such an experiment knew it was entering upon a program the costs of which could not be approximated with any degree of accuracy. The statute enacted is itself eloquent evidence of the Legislature's evident attempt and intent to ameliorate a felt need and at the same time limit the cost of the program by limiting the scope of monetary benefits granted as well as the burdens incident to administration of an intra as compared to an inter state program. And the Legislature's limitation of the program on the basis of residency did and does not infringe on the right such a discrimination normally violates, the right to travel or migrate. This is so for the statute imposes no duration or time requirement whatever on the residency which is required.

In light of the very limited residency restriction imposed, in light of the right appellant was exercising—to enter and remain temporarily in California for purposes of a vacation—the same right being exercised in *Baldwin,* and in light of California's determined need to limit the scope of the obligations created by its victims of crime act so as to protect California's fisc, appellees submit there was and is substantial reason for and that the simple non-durational residency requirement imposed clearly does not violate the privileges and immunities clause of Article IV Section 2(1).

3. The non-durational residency limitation included in California's victim of crime statute does not violate Fourteenth Amendment Protections

Unlike the privileges and immunities clause of Article IV Section 2(1), the Fourteenth Amendment has frequently been the basis of attack on residency requirements imposed by State enactments. Appellant herein argues, in substance, that the non-durational residency limitation imposed in California's victims of crime act is like Constitutional defects which violate fundamental rights through discriminations based on durational residency requirements. Appellees submit that under clear and current decisions of this Court, such argument is not in point and that appellant's Fourteenth Amendment appeal presents no substantial federal questions.

It should first be remembered that even durational residency requirements are not always violations of the Fourteenth Amendment equal protection clause. (*Sosna v. Iowa,* 419 U.S. 393, 406 (1975)). While durational residency limi-

tations which affect fundamental rights must, to be valid, be the offspring of and serve compelling state needs or interests (*Shapiro v. Thompson,* 394 U.S. 618 (1969) (welfare benefits required to meet bare necessities); *Dunn v. Blumstein,* 405 U.S. 330 (1972) (voting registration); *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974) (free non-emergency medical care), non-fundamental rights may be conditioned on either durational or non-durational residency requirements. (*Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970) aff'd 401 U.S. 985 (1971) and *Kirk v. Board of Regents,* 273 Cal.App.2d 430 (1969), dismissed for want of substantial federal question (*Kirk v. Board of Regents,* 396 U.S. 554 (1970) (durational residency requirement for lower tuition); *Sosna v. Iowa,* 419 U.S. 393 (1975) (durational residency for divorce)).

As to non-durational residency requirements and especially those which do not affect fundamental rights, such do not violate the Fourteenth Amendment. In *Shapiro v. Thompson,* 394 U.S. 618 (1969) at page 633 this Court as to the validity of residency requirements stated:

> "We recognize that a State has a valid interest in preserving the fiscal integrity of its programs."

This Court in 1978 had occasion to consider the validity under the Fourteenth Amendment equal protection clause of a statutory scheme which discriminated on a non-durational basis between resident hunters and non-resident vacationing sportsmen. In the *Baldwin* case at page 391, after finding the State's efforts were rational and not invidious, the Court stated as to significant licensing differentials:

> "We perceive no duty on the State to have its licensing structure parallel or identical for both residents and

> non-residents, or to justify to the penny any cost differential it imposes in a purely recreational, non-commercial, non-livelihood setting. Rationality is sufficient."

As noted in Section 2 above, the residency limitation involved in the instant appeal is a non-durational one. The statute with which it deals affects no right yet declared fundamental; the right to be compensated by a State for injuries suffered as a result of criminal conduct would hardly seem to rise to the level of a right to a free, as opposed to a tuition conditioned, education, which right or differential this Court has at least twice held may be made dependent on a durational residency requirement (*Kirk v. Board of Regents,* 273 Cal.App.2d 430 (1969), motion to dismiss for lack of substantial federal question granted 396 U.S. 554 (1970); *Starns v. Malkerson,* 326 F.Supp. 234 (D. Minn. 1970), aff'd mem. 401 U.S. 985 (1971)).

As in the *Baldwin* case, appellant entered and was in California not as a migrant thereto, not to pursue his livelihood therein, not to make it his home or to acquire property there or to enlist the aid of its courts. As in *Baldwin,* appellant simply temporarily traveled from the State of his continued residency for a temporary stay, a vacation, in California. As a simple matter of happenstance and not as a to be anticipated incident of his vacation, he fell victim to a crime. The differentiation made by California's statute is clearly not irrational. Such was designed to limit the State's financial exposure by limiting the group eligible to receive benefits and by easing the administration of the program by basically making the same one which need only be administered on an intrastate

basis. Such being the case, appellees submit the instant appeal raises no substantial federal equal protection questions.

As to the privileges or immunities of citizens of the United States clause of the Fourteenth Amendment, appellees know of no authority which indicates such imposes additional or more stringent limitations than are imposed by the equal protection clause.

4. The non-durational residency limitation does not violate the Commerce Clause

California's non-durational residency requirement does not, as appellant contends, violate the Commerce Clause. This Court's most recent pronouncement on residency and the Commerce Clause, *Reeves Inc. v. Stake* No. 79-677 decided June 19, 1980, holds that a State which prefers its residents over prospective non-resident purchasers in sale of a commodity manufactured by the State does not violate the Commerce Clause, Article I Section 8 cl. 3. In so concluding, the Court, after differentiating between a State acting as a proprietor-market-participant and as a market regulator, explained the object of the Clause:

> " . . . the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national market."

California's victims of crime statute, including its limitation of benefits to residents, has little if any connection with regulation of private trade and imposes no apparent effects on taxes on anyone or on any business transactions.

The instant case does not appear to present any but the most tangential of commerce clause questions. California

is not acting as a direct or indirect market participant. It appears clear that it is not attempting to tax, let alone tax so as to affect interstate commerce. It similarly would appear that in implementing its victims of crime statutes, California is not attempting to regulate commerce. And appellees know of no authority which would apply the Commerce Clause to this type of State action or which imposes additional or more stringent limitations than are imposed by the equal protection clause. Accordingly appellant raises no substantial federal question under the Commerce Clause.

CONCLUSION

None of the grounds advanced by appellant in his Jurisdictional Statement present any substantial federal question. To the contrary, appellant in substance repeats what he did in the California Court of Appeal; he in effect asks this Court to ignore its recent and in point decision in *Baldwin v. Montana Fish and Game Comsn.*, 436 U.S. 371 (1978), to treat such as an irrelevant aberration of no precedential value, and to exclusively apply the stricter *Hicklin v. Orbeck*, 437 U.S. 518 (1978) test, notwithstanding significant factual differences and the fact this Court decided *Hicklin* within a month of *Baldwin* and in its decision cited its reasoning in *Baldwin* with approval.

California's statute is an experiment and attempt to alleviate or ameliorate one of society's ills in California, the havoc wrought to victims by criminal conduct. Resources developed largely in California are the foundation of the program. The benefits of the program are available to all who are residents of California, as soon as and as

long as they are residents. The residency limitation has no durational component. It seems clear that California's interest in limiting the exposure of its fisc to expenditure, both by benefits paid and by cost of administration of an intra as compared to an interstate program are a perfectly rational basis for the minimal discrimination imposed. It further appears that such limitation would likely have little, if any effect whatever, on a non-resident's decision to vacation or not vacation in California. Accordingly, appellees respectfully submit this appeal presents no substantial federal question and that thus their motion to affirm or dismiss should be granted.

Dated: July 23, 1980

Respectfully submitted,

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